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**OPINION OF THE PUBLIC ACCESS COUNSELOR**

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ROBERT M. KENDALL  
*Complainant,*

v.

BROWNSBURG TOWN COUNCILOR BRIAN JESSEN  
*Respondent.*

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Formal Complaint No.  
21-FC-88

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Luke H. Britt  
Public Access Counselor

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BRITT, opinion of the counselor:

This advisory opinion is in response to a formal complaint alleging Brownsburg Town Councilor Brian Jessen violated the Access to Public Records Act.<sup>1</sup> Councilor Jessen filed an answer on behalf of his office. In accordance with Indiana Code § 5-14-5-10, I issue the following opinion to the formal complaint received by the Office of the Public Access Counselor on June 29, 2021.

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<sup>1</sup> Ind. Code § 5-14-3-1-10.

## **BACKGROUND**

This case involves a dispute over access to a town councilor's social media account.

Robert M. Kendall (Complainant) asserts that Brownsburg council member Brian Jessen posts public information regarding the town on his personal Facebook page; and thus, those posts can only be seen by certain people "friended" by Jessen.

As a result, Kendall filed a formal complaint with this office on June 29, 2021, arguing that councilor Jessen violated the Access to Public Records Act (APRA) by using a private account to post public information.

Jessen provided a response to the complaint on July 29, 2021. For his part, Jessen contends that he maintains a separate a social media account for friends and family, which is mutually exclusive from his official town council Facebook page. Jessen argues that he does not post official town information on his personal page, which is limited to friends and family. Moreover, he states no public business is conducted on the personal account. He also confirms that Kendall is not on his friends list for that account.

As for his public account, councilor Jessen argues no one is prohibited from viewing or interacting with this account other than those he has identified as fake or spam accounts. Jessen contends that Kendall is not blocked and can view this page freely.

## ANALYSIS

### 1. The Access to Public Records Act

The Access to Public Records Act (APRA) states that “(p)roviding persons with information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information.” Ind. Code § 5-14-3-1.

The Town of Brownsburg is a public agency for purposes of APRA; and therefore, its members are subject to the law’s requirements. *See* Ind. Code § 5-14-3-2(q). As a result, unless an exception applies, any person has the right to inspect and copy the council’s public records during regular business hours. Ind. Code § 5-14-3-3(a). Indeed, APRA contains mandatory exemptions and discretionary exceptions to the general rule of disclosure. *See* Ind. Code § 5-14-3-4(a)—(b).

### 2. Social media and APRA

Under APRA, the definition of public record includes:

any writing, paper, report, study, map, photograph, book, card, tape recording, or other material that is created, received, retained, maintained, or filed by or with a public agency and which is generated on paper, paper substitutes, photographic media, chemically based media, magnetic or machine readable media, electronically stored data, or any other material, regardless of form or characteristics.

Ind. Code § 5-14-3-2(r). As agents of the Brownsburg Town Council, members of the council can individually create

public records when acting in their official capacities as public officials. In *Citizens Action Coalition v. Koch*, the Indiana Supreme Court concluded that APRA applies to the General Assembly and its members. 51 N.E.3d 236, 242 (Ind. 2016). The same is true with town council members.

While social media is not explicitly referenced in APRA, this office considers social media material to be covered by the definition of public record.

Notably, however, in order for a post, tweet, picture or page to be considered a public record, a public official must create the documentation in the scope of their official capacity. This office has acknowledged that there should be a separation between official records and those created in a personal or political capacity. *See Informal Opinion of the Public Access Counselor*, 18-INF-08 (2018).

As part of its investigation, this office reviewed both accounts. No one on this office's staff is Facebook friends with Jessen; and thus, we could not access those posts. We have confirmed that Jessen maintains a rather robust public-facing account with town updates and issues.

Some public officials' social media accounts are public business because the creator of those accounts hold them out to be part of their public business activities. It is unclear whether Jessen's personal page is one of those accounts.

To be sure, if Jessen conducts public business on a personal social media page, then blocking a constituent without an exceptional reason would be a barrier to access and a violation of the Access to Public Records Act if those communications are denied.

In the end, the public page maintained by Jessen does in fact appear to be the official account of his duties as a town council member. Kendall appears to be an active participant on the page as is his prerogative as Jessen's constituent. To the extent Jessen's personal page does not display public business not also found on his public page, there is no violation of law or policy.

## CONCLUSION

Based on the foregoing, it is the opinion of this office that Brownsburg Town Councilor Brian Jessen did not violate the Access to Public Records Act. The social media account in question is not public record. Thus, this office lacks jurisdiction to address the blocking of the complainant.



Luke H. Britt  
Public Access Counselor